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Supreme Court of the United States

OCTOBER TERM, 1942

No. 495

G. E. BURFORD, ET AL.,
Petitioners

v.

SUN OIL COMPANY, ET AL.,
Respondents

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINIONS BELOW

No formal opinion was written by the District Court, but findings of fact and conclusions of law were filed (R. 88-92). Three opinions have been written by the Circuit Court of Appeals. On December 29, 1941, the Circuit Court of Appeals wrote a unanimous opinion (R. 409) affirming the judgment of the District Court, which opinion is reported in 124 F. (2d) 467. The first petition for rehearing (R. 415) filed by the respondents, Sun Oil Company, et al., was overruled without opinion on February 2, 1942 (R. 421). The respondents, Sun Oil Company, et al., filed a second petition for rehearing on June 1, 1942, (R. 421) and on July 11, 1942, the Circuit Court of Appeals wrote an opinion granting

the second petition for rehearing, setting aside its former judgment, and reversing the judgment of the District Court (R. 429). Judge McCord wrote a special concurring opinion (R. 440). These opinions are reported in 130 F. (2d) 10, 18. On August 12, 1942, the Circuit Court of Appeals wrote an opinion denying the motion of Republic National Bank of Dallas for leave to file a petition in intervention in the nature of a petition for rehearing (R. 474). Judge McCord dissented from this opinion (R. 476). These opinions are reported in 130 F. (2d) 18, 19.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C., Title 28, Sec. 347). The judgment to be reviewed was entered on July 11, 1942 (R. 440), and these petitioners' petition for rehearing was denied on August 13, 1942 (R. 477). The petition for a writ of certiorari was filed in this Court on October 27, 1942, and was granted on December 14, 1942.

STATEMENT OF THE CASE

This suit was brought by the Sun Oil Company, a New Jersey corporation, against G. E. Burford and the Railroad Commission of Texas and its members, all Texas citizens, and X.Y.Z Oil & Gas Company, an Oklahoma corporation, to set aside and nullify an

order entered by the Railroad Commission dated June 2, 1939 (R. 31) permitting Burford to drill four oil wells upon his 2.33 acre lease in the East Texas Oil Field and to enjoin the drilling and production of oil from such wells. In the alternative, it was prayed that production from these wells be enjoined until the Railroad Commission should restrict the production from such wells to an amount in proportion to the acreage of said lease (R. 29). Jurisdiction was alleged by reason of diversity of citizenship and also because of plaintiff's claim that the Railroad Commission's order violated its property rights under the 14th Amendment to the Constitution of the United States (R. 2). Magnolia Petroleum Company, a Texas corporation, was permitted to intervene as a plaintiff, alleging that the Railroad Commission's order violated its property rights under the 14th Amendment (R. 34). Both the plaintiff and the intervener attacked the validity of the Railroad Commission's order under the state law, under the provisions of Article 6049c, sec. 8, Vernon's Annotated Texas Civil Statutes*, as well as under the Federal Constitution.

*This statute reads as follows:

"Any interested person affected by the conservation laws of this State relating to crude petroleum oil or natural gas, and the waste thereof, including this Act, or by any rule, regulation or order made or promulgated by the Commission thereunder, and who may be dissatisfied therewith, shall have the right to file a suit in a Court of competent jurisdiction in Travis County, Texas, and not elsewhere, against the Commission, or the members thereof, as defendants, to test the validity of such laws, rules, regulations or orders. Such suit shall be advanced for trial and be determined as expeditiously as possible and no postponement thereof or continuance shall be granted except for reasons deemed imperative by the Court. In all such trials, the burden of proof shall be upon the party complaining of such laws, rule, regulation or order; and such laws, rule, regulation or order so complained of shall be deemed prima facie valid."

The grounds of attack under the Fourteenth Amendment were that the Railroad Commission did not hear "substantial evidence" justifying the granting of the permit (R. 15-17, 20), that such evidence as was heard was not properly considered by the Railroad Commission (R. 14-15) and that the permit order would give Burford an unreasonable "advantage in drainage opportunity." (R. 23, 25).

The same grounds on which the Railroad Commission's order was asserted to be invalid under the Fourteenth Amendment were also urged as grounds for striking down the order under the state law, and the following additional grounds of attack under the Texas statutes were also urged: (1) that the Railroad Commission had no authority under the state law to consider the 2.33 acre tract as a separate tract in determining whether a permit should be granted to drill wells as exceptions to the spacing rule, because of the narrow dimensions of the tract (R. 9); (2) that a judgment of the state court of Travis County, in Cause No. 54,769, in that court, nullifying a permit granted October 11, 1934, to drill a well upon the same tract of land, which judgment was entered January 31, 1935, had the effect of making the question of the right to drill any well upon the 2.33 acre strip *res judicata* (R. 12); (3) that the Railroad Commission was without jurisdiction to grant the Burford permit because of the pendency of another suit in the state court in Travis County, in Cause No. 53,915, involving the validity of a permit dated February 1, 1934, granted to a previous lessee upon the same tract of land (R. 15).

The case was tried by the District Judge without a jury. The evidence included the transcripts of the testimony taken at the three hearings before the Railroad Commission (R. 233-366) and also original evidence relating to the reasonableness of the Railroad Commission's order (R. 366-399), and the procedure before the Railroad Commission (R. 213-230).

The evidence showed that the permittee, G. E. Burford, was the owner of an oil and gas lease on a narrow strip of land containing 2.33 acres in the East Texas oil field. Prior to 1939, no wells had been drilled on Burford's lease (R. 381, 391). Sun Oil Company owns a 50 acre lease immediately west of Burford's tract, on which it has drilled seven wells, and Magnolia Petroleum Company owns a 50 acre lease immediately east of Burford's tract, on which it has drilled six wells (R. 104, 150, 399). The wells drilled by Sun Oil Company and Magnolia Petroleum Company, prior to the Railroad Commission's hearing in 1938, had already produced about 5,000 barrels of oil per acre, or about 250,000 barrels from each lease (R. 347). Because of the location of these leases in the extreme eastern portion of the East Texas oil field, all of this oil has been replaced by oil migrating from other leases (R. 347). These wells on the Sun and Magnolia leases have drained and are still draining oil from Burford's lease (R. 243-245) as well as from other surrounding tracts. Without the wells granted by the Railroad Commission, Burford would have no opportunity to recover the oil under this tract or its equivalent. Of the four wells

drilled by Burford on his lease, one was a dry hole and another was a pumper (R. 391).

With regard to the plea of *res judicata*, the evidence showed substantial changes in the situation in this particular area (R. 376, 395), as well as notorious changes in reservoir conditions during the intervening years (R. 375). With regard to the pendency of a suit testing the validity of another permit, issued in 1934, in the state court, the record showed that this early order had been issued without notice and had been abandoned by the permittee long before Burford made his application (R. 237, 292). The evidence regarding the procedure before the Railroad Commission (R. 213-230) showed that the Railroad Commission gave due consideration to the evidence taken before its examiner, and the attack on the Railroad Commission's order for lack of procedural due process has been in fact abandoned by the respondents, since it was never raised in the Circuit Court of Appeals or in respondents' cross-petition for a writ of certiorari.

At the conclusion of the evidence, the District Court entered judgment for the defendants, after announcing his opinion "that the issues of law and fact are with the defendants" (R. 87). The District Court also entered findings of fact and conclusions of law in which, after finding the facts in favor of the defendants, he concluded (1) "that the challenged order of the Railroad Commission of Texas does not violate any of the rights of the plaintiff or the intervener under the 14th Amendment to the Constitu-

tion of the United States" (R. 90), and (2) "that the various matters of state law raised present no federal question and furthermore present no matters of such merit as to warrant the issuance of an injunction" (R. 91).

Upon appeal to the United States Circuit Court of Appeals for the Fifth Circuit that court (Judges Holmes, McCord, and Dawkins) on December 29 1941, affirmed the judgment of the District Court. The unanimous opinion (124 F. (2) 467) held (1) that the effect of the decisions of this Court in the two cases entitled *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U. S. 573, and 311 U. S. 570, was to relegate the parties to the state courts for decision of all questions of state law and, therefore, that these questions should not be decided by the federal courts and (2) that the record did not show "conditions amounting to a denial of Due Process or other violations of the Federal Constitution" (124 F. (2d) at p. 470).

A first petition for rehearing was filed by the respondents Sun Oil Company, et al., on January 19, 1942 (R. 415). This first petition for rehearing was denied without opinion on February 2, 1942 (R. 421). No request for a stay of mandate was filed and on February 17, 1942, the mandate was issued (R. 429). No attempt was made by the appellants, Sun Oil Company and Magnolia Petroleum Company, to take the case to the Supreme Court of the United States by certiorari or otherwise.

Nearly four months after the first petition for re-

hearing was denied and more than three months after the mandate was issued, Sun Oil Company and Magnolia Petroleum Company, on June 1, 1942, filed a second petition for rehearing (R. 421). This second petition for rehearing raised no new questions of law or fact, merely adopting the arguments therefore presented in the first petition for rehearing, and asserting that the court's decision in this case was in conflict with its later decision in *Selby Oil & Gas Co.* v. *Railroad Commission*, 128 F. (2d) 334, decided May 13, 1942 (Judges Hutcheson and Foster; Judge McCord dissenting).

Over the objections of the petitioners that the second petition for rehearing was filed too late and was without merit (R. 423), the Circuit Court of Appeals on July 6, 1942, entered its order recalling its mandate and permitting the second petition for rehearing to be filed (R. 429). Thereafter, on July 11, 1942, the Circuit Court of Appeals set aside its former judgment, reversed the judgment of the District Court and remanded the case to the District Court for a new trial (R. 440). While not agreeing with the conclusion expressed in the majority opinion by Judge Hutcheson in the case of *Selby Oil & Gas Co.* v. *Railroad Commission*, 128 F. (2d) 334, the court (with Judge McCord specially concurring) nevertheless held that its former judgment should be set aside, because, since the rendition of said judgment, the Supreme Court of Texas March 11, 1942, had held in the case of *Railroad Commission* v. *Shell Oil Co.*, 161 S. W. (2d) 1022, that under the Texas statutes, the review of the Railroad Commission's

order is strictly *de novo* and that in reviewing the reasonableness of the Railroad Commission's order, the court should exercise its "independent judgment."

Disregarding the fact that the District Court had already passed on all questions of fact and of state law, upon original evidence, in favor of the validity of the Railroad Commission's order, and without discussing the sufficiency of the evidence to sustain the District Court's finding, the Circuit Court remanded the case for a new trial, in order that the District Court might, in its "independent judgment," determine "whether at the time of promulgation there existed facts that warranted fair and reasonable minds in arriving at the conclusion that the order was proper and necessary to prevent the waste of public resources or confiscation of private property" (130 F. (2d) at pp. 17, 18).

A first petition for rehearing was filed by petitioners and was denied by the court without opinion on August 13, 1942 (R. 477). A motion for leave to file a petition in intervention in the nature of a petition for rehearing was presented by Republic National Bank of Dallas, which had loaned $30,000.00 upon an oil payment in reliance upon the first judgment of the court (R. 447). This motion was denied on August 12, 1942 (R. 477). The opinion of the court (R. 474) was written by Judge Holmes (130 F. (2d) at p. 18). Judge McCord dissented upon the ground that "the Appellants' Second Petition for Rehearing came too late and should not have been granted" (R. 476, 130 F. (2d) at p. 19).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that it had jurisdiction to grant the respondents' second petition for rehearing and to set aside the judgment entered December 29, 1941, when said second petition for rehearing was filed more than three months after the first petition for rehearing was denied, more than three months after the mandate had been issued, and more than three weeks after the expiration of the period fixed by statute for applying to the Supreme Court of the United States for a writ of certiorari.

2. In holding that it should grant the respondents' second petition for rehearing when the respondents had not shown any diligence in attempting to secure a review of the judgment entered December 29, 1941, in that they failed to exercise their right to petition the Supreme Court of the United States for a writ of certiorari to review said judgment.

3. In holding that the United States District Court must determine the validity under the Texas law of an order of the Railroad Commission of Texas granting a permit to drill four oil wells by the exercise of the court's "independent judgment" on the question of whether the facts warranted the conclusion that the administrative order was proper and necessary to prevent the waste of public resources or the confiscation of private property.

4. In reversing the judgment of the District Court and in remanding the case for a new trial, since the District Court, upon original and sufficient evidence, decided all issues of fact and of state law in favor of the validity of the Railroad Commission's order.

ARGUMENT

Summary of Argument

1. The Circuit Court of Appeals did not have jurisdiction to entertain and to grant the respondents' second petition for rehearing, since the second petition for rehearing was filed more than three months after the first petition for rehearing had been denied.

2. If the Circuit Court of Appeals had jurisdiction to entertain the second petition for rehearing filed by the respondents, it abused its discretion in granting said petition since said petition raised no new question of fact or law and the respondents had not shown the proper diligence in that they had failed to apply for a writ of certiorari to this Court within the statutory period.

3. The Circuit Court of Appeals erred in holding that the District Court should determine the validity of the Railroad Commission's order under the state law by the exercise of its "independent judgment" as to the reasonableness of such order, prior to the determination of the validity of such order in the state court.

4. The evidence heard by the District Court was

sufficient to sustain its findings and conclusions that the order attacked was valid under the state law.

1.

The Circuit Court of Appeals was without jurisdiction to entertain or grant the respondents' second petition for rehearing, because said second petition for rehearing was filed after the time had expired for applying for a writ of certiorari from the original judgment entered by the Circuit Court of Appeals.

The Circuit Court of Appeals' first judgment was entered December 29, 1941 (R. 413); the appellants' first petition for rehearing was denied February 2, 1942 (R. 421); no motion for a stay was filed and the mandate was issued February 17, 1942 (R. 429). Nothing further was done by appellants until their second petition for rehearing was filed June 1, 1942 (R. 421). This second petition for rehearing set up no new questions of law or fact, but merely incorporated by reference (R. 422) the contentions made in the first petition for rehearing.

There is no provision contained in the rules of the Circuit Court of Appeals for a second petition for rehearing. Previously that court had stated that its rules did not contemplate the filing or consideration of second petitions for rehearing, particularly where such petitions presented no new questions not previously raised. See *City of Stuart* v. *Green*, 91 F. (2d) 603, 606, where Judge Holmes said:

> "Our rules do not contemplate the filing or consideration of second applications for rehearing. The petition now filed presents nothing that

had not been previously considered. Such practice is not to be encouraged. Williams v. Conger, 131 U. S. 390, 9 S. Ct. 793, 33 L. Ed. 201."

After the first petition for rehearing was denied on February 2, 1942, the respondents had three months within which they could seek a review by this Court of the judgment of the Circuit Court of Appeals by a petition for a writ of certiorari. 28 U. S. Code, sec. 350. This time expired on May 2, 1942. From February 2, 1942, to June 1, 1942, the respondents had taken no action of any character whatever to stay or to review the judgment entered December 29, 1941. It is submitted that upon the expiration of the time fixed by statute for review by this Court, the Circuit Court of Appeals' judgment became final and the Circuit Court of Appeals had no power thereafter to permit the filing of a second petition for rehearing.

The holding of the Circuit Court of Appeals that it retained jurisdiction to entertain and grant the respondents' second petition for rehearing is based on the purely technical conception of the term of court. The statute (Judicial Code, section 126; 28 U. S. C., section 223) and the rules of the Circuit Court of Appeals do not fix the length of the terms of court, but merely provide that a session of the court shall be held annually at the places named, including one session at the City of Fort Worth, Texas, beginning on the first Monday in November. (Rule 3, United States Circuit Court of Appeals for the Fifth Circuit.) The Circuit Court of Appeals ap-

parently construes the statute and its rule to mean that each term lasts for one year. The Circuit Court of Appeals holds that it retains jurisdiction to entertain a petition for rehearing filed at any time during the term at which the judgment is rendered, regardless of the fact that the time for applying for a writ of certorari to this court has expired. Since the terms of court apparently last for one year each, it may be as much as eleven months or longer after a judgment is rendered and a first petition for rehearing is overruled, before the term expires and the judgment can be considered final.

The evident intention of Congress in enacting Section 350 of Title 28, United States Code, limiting the time within which a petition for certiorari may be filed for review of a judgment of the Circuit Court of Appeals to three months after the judgment was entered, was to fix a period of time within which the judgments of such courts might be considered final. It is contrary to every consideration of policy in favor of reasonably prompt termination of litigation to permit a party to wait until this period has expired and then to reopen the case by filing a second petition for rehearing in the Circuit Court of Appeals. The Supreme Court has no jurisdiction to review a decree of the Circuit Court of Appeals where the petition for certiorari is not filed until after the statutory period has expired. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399. The period for filing a petition for rehearing in the Circuit Court of Appeals should certainly be no longer than the

period allowed by statute for applying for review by this Court.

This question has not been settled by any decision of this Court. The only cases cited by the Circuit Court of Appeals to sustain its holding do not relate to the question of the jurisdiction of that court to entertain a petition for rehearing which is filed after the time for review in this Court has expired. In *Henderson* v. *Carbondale Coal & Coke Co.*, 140 U. S. 25, the petition for rehearing was promptly filed; in such case, it is conceded that a court may grant a rehearing and set aside its judgment entered during the same term of court. In *Thomsen* v. *Cayser*, 243 U. S. 66, the opinion does not disclose when the petition for rehearing was filed, and no point was raised or discussed about the time when it was filed.

In this connection, we respectfully direct the court's attention to the analogy of the limitation placed on motions for new trial in the District Courts under the Rules of Civil Procedure. Under Rule 6(c) the time for doing an act or taking any proceeding is not limited by the expiration of the term of court. Under Rule 59(b) the time in which a motion for new trial can be served cannot extend beyond "the expiration of the time for appeal." It is submitted that the same principles apply to this case. The term of court has no logical connection with the time for filing a petition for rehearing, and in any event the court entering a judgment should not permit the filing of a petition for rehear-

ing after the time for applying for review in the appellate court has expired.

2.

If the Circuit Court of Appeals had jurisdiction to permit the filing of the respondents' second petition for rehearing, it abused its discretion in granting said second petition for rehearing because said petition presented no equitable grounds for a rehearing and no new questions of law or fact.

The respondents' second petition for rehearing did not set up any fact or urge any questions of law which had not theretofore been thoroughly presented. In their second petition for rehearing, respondents moved the court "to reconsider their petition for rehearing heretofore filed on January 19, 1942, each ground of which is here adopted." (R. 422). The occasion for filing the second petition for rehearing was that it was alleged that in a different case, entitled *Selby Oil & Gas Co.* v. *Railroad Commission*, the Circuit Court of Appeals on May 13, 1942, had handed down a decision which was inconsistent with the first decision in the present case. (R. 422).

It will be noted that there were no allegations of fraud, mistake, or any other equitable ground for obtaining a rehearing of the cause. Nor was there any allegation of newly discovered facts or evidence. The only ground for asking that the second petition

for rehearing be granted was that the court had decided the same questions of law, heretofore decided in this case, in a different way in a subsequent case.

The questions presented and decided by the Circuit Court of Appeals in its first judgment and opinion which were alleged by the respondents to have been differently decided in the Selby Case were questions that had to do with the interpretation of the opinions of this Court in the *Rowan & Nichols Cases*, 310 U. S. 573 and 311 U. S. 570. It was contended by the respondents in their second petition for rehearing that whereas the Circuit Court of Appeals in the first decision of this case had held that all questions of state law were to be relegated to the state courts for decision, in the Selby Case the same court had held that questions of state law should be decided by the federal courts in cases involving diversity of citizenship. In other words, Judge Dawkins in the first opinion in this case held that the Rowan & Nichols cases meant that questions of state law should not be adjudicated by the federal courts, whereas Judge Hutcheson in the Selby case construed the same decisions of this court to mean that questions of state law should be decided in cases involving a diversity of citizenship.

By the exercise of proper diligence, the respondents could have obtained a review of the first judgment of the Circuit Court of Appeals in this case on this particular question by making a timely appli-

cation for a writ of certiorari, on the ground that the Circuit Court of Appeals had misconstrued the effect of the opinions in the Rowan & Nichols cases. They neglected to do so. They had a plain remedy available but they failed to take advantage of it. The granting of a petition for rehearing, and particularly a second petition for rehearing, should be contingent upon the exercise of the utmost diligence by the party asking for such rehearing and where, as in this case, such diligence is entirely absent, the Circuit Court of Appeals abused its discretion in granting the relief prayed for, even assuming that it had jurisdiction to entertain the second petition for rehearing.

3.

The Circuit Court of Appeals erred in holding that the District Court should exercise an independent judgment on the reasonableness of the Railroad Comission's order under the Texas statutes.

The question here presented is the extent to which the federal courts will inquire into the reasonableness of the order of a state administrative body in determining the validity of such order under the state law. The question turns upon the proper interpretation of opinions of this Court in the *Rowan & Nichols Cases*, 310 U. S. 573 and 311 U. S. 570.

The District Judge who tried this case is the same District Judge who tried the first *Rowan & Nichols*

Case, 310 U. S. 573, and was a member of the three-judge court which tried the second *Rowan & Nichols Case*, 311 U. S. 570. The record in this case shows that the District Judge conscientiously followed this Court's opinions in the *Rowan & Nichols Cases*. After holding that the Railroad Commission's order "does not violate any of the rights of the plaintiff or the intervener under the 14th Amendment to the Constitution of the United States" (R. 90), the District Judge then held that "the various matters of state law raised present no federal question and further present no matters of such merit as to warrant the issuance of an injunction" (R. 91). The District Judge construed the *Rowan & Nichols Cases* to hold that in applying the state law in "oil regulation cases," relief by injunction in the federal courts should not be granted "unless some condition is uncovered more extreme than those on which the courts have heretofore felt warranted in acting" (R. 91). Since such conditions were not found to exist in this case, the District Court denied relief.

The Circuit Court of Appeals in its first opinion approved the holding of the District Court that the evidence did not show any violation of the respondents' rights under the 14th Amendment (124 F. (2d) at p. 470). Although the District Court had expressly held that the various matters of state law presented were without merit (R. 91), the Circuit Court of Appeals misconstrued the District Court's action and held in effect that the District Court had refused to pass on the issues of state law (124 F.

(2d) at p. 468). The Circuit Court of Appeals then approved the District Court's judgment in the following language (124 F. (2d) at p. 469):

> "In the absence of a clear showing of confiscation or lack of Due Process, such bodies should be left, at least by the Federal Courts, to deal with the situation, unless and until the court of last resort of the State has decided that an 'independent judgment' as to reasonableness should be exercised by the courts."

The Circuit Court of Appeals thus construed the opinions of this Court in the *Rowan & Nichols Cases* to mean that the extent to which a federal court would inquire into the reasonableness of an administrative order of a state board, in determining its validity under the state law, depends upon the construction by the state court of the state statute providing for the review of the administrative board's order.

Thereafter, on May 13, 1942, the same Circuit Court of Appeals (but with Judges Hutcheson, Foster, and McCord composing the court) in another oil regulation case reached an entirely different conclusion as to the extent to which the federal court should pass on the reasonableness of an order of the Railroad Commission. *Selby Oil & Gas Co.* v. *Railroad Commission*, 128 F. (2d) 334. In an opinion by Judge Hutcheson, from which Judge McCord dissented, it was held (1) that in cases of diversity of citizenship, the state review statute (Article 6049c, Sec. 8, Vernon's Annotated Texas Civil Statutes)

presented a distinct "statutory suit" (128 F. (2d) at p. 335) in addition to the "constitutional suit," (2) that the rule stated by this court in the *Rowan & Nichols Cases* applied only to cases not involving diversity of citizenship (128 F. (2d) at pp. 336-337), (3) that in cases of diversity of citizenship, the Federal Courts should follow the state decisions and that, since the state decisions hold that in the "statutory suit" the court must exercise its "independent judgment" in determining "whether the order rests upon a reasonable basis," the District Court erred in not determining this "statutory suit" by the "rules established by the Texas court" (128 F. (2d) at p. 337). Judge McCord dissented upon the ground that the decision was in conflict with the *Rowan & Nichols Case* and also the recent decision by the same Circuit Court of Appeals in the present case (128 F. (2d) at p. 337).

On June 1, 1942, the appellants, Sun Oil Company, et al., filed their second petition for rehearing in this case, alleging that the decision in the *Selby Case* was in conflict with the decision theretofore rendered in the present case (R. 421).

In granting the second petition for rehearing in this case, the Circuit Court of Appeals stated that it did so "to avoid injustice to anyone from a conflict in our decisions" (130 F. (2d) at p. 13). However, Judge Holmes, in the majority opinion, refused to concur in the conclusion reached by Judge Hutcheson that there were two suits—a "constitutional suit" and a "statutory suit"—and held that there was

"only one suit" (130 F. (2d) at p. 16). Nevertheless, the court set aside its former judgment, because it purported to find in the decision of the Supreme Court of Texas in *Railroad Commission* v. *Shell Oil Co.*, 161 S.W. (2d) 1022 (rendered March 11, 1942), a declaration that in determining the reasonableness of the Railroad Commission's orders, the state courts must exercise their "independent judgment" (130 F. (2d) at p. 16). The Circuit Court of Appeals regarded this alleged clarification of the Texas law as being sufficient ground for setting aside its former judgment of affirmance and substituting a judgment reversing the judgment of the District Court and remanding the case for a new trial (R. 440).

Judge McCord specially concurred in a separate opinion, in which he doubted the right of the Circuit Court of Appeals to grant a rehearing "after the lapse of such great length of time," but agreed to the reversal in order that "the two cases (the *Selby Case* and this case) can on a new trial be determined in conformity with the decision of the Supreme Court of Texas, and the conflict which now exists in our two opinions may be obliterated" (R. 440). No explanation was given as to how the District Court could obliterate the conflicts in the opinions of the Circuit Court of Appeals in the present case and the *Selby Case*, when the Circuit Court of Appeals could not itself harmonize its own opinions.

In overruling the motion of Republic National Bank of Dallas to intervene, the majority of the court again stated that "the supervening decision of the

Supreme Court of Texas, holding that the state courts might exercise such independent judgment, made it necessary for us to hold in our second opinion that the federal courts might decide such issues arising under the laws of the state. This was for the reason that prior to that time we deemed the particular point unsettled by Texas decisions, and were in doubt as to the state law on the subject" (130 F. (2d) at p. 19).

Judge McCord dissented from this opinion, his former doubts having become crystallized into the definite opinion "that the appellants' second petition for rehearing came too late and should not have been granted" (130 F. (2d) at p. 19).

The result of the three opinions in this case and the opinion in the *Selby Case* is to leave the applicable law in such confusion that it would be a practical impossibility for the District Judge to know how to try this case. The opinions of the Circuit Court of Appeals conflict with each other and all of them are in conflict with the law as laid down by this Court in the *Rowan & Nichols Cases.*

The effect of the opinion of the Circuit Court of Appeals in this case is that the federal courts must go as far as the state courts would go in exercising an "independent judgment" in determining whether the order of the Railroad Commission is reasonable or not under the state law. Under the Texas decision relied upon by the Circuit Court of Appeals, *Railroad Commission* v. *Shell Oil Co.*, 161 S. W. (2d) 1022, it is held that "the doctrine that the administrative

agency should take the testimony and make the findings of fact, and that the findings should be binding on the court, is foreign to the law of this state." (161 S. W. (2) at p. 1028.) The federal rule that the findings of a board, if supported by evidence are conclusive, is repudiated in Texas. (161 S. W. (2d) at p. 1028.) Evidence must be taken anew in the court. (161 S. W. (2d) at p. 1029.) "Whether the agency heard sufficient evidence is not material. In fact, the evidence heard by the agency is not per se admissible upon the trial in the District Court." (161 S. W. (2d) at p. 1030.)

It is evident that the process which must be followed by the Texas courts under the decision of the Texas Supreme Court, in determining whether the order of the Railroad Commission is valid under the state law, is very different from the process to be followed by a federal court in determining whether the order is valid under the 14th Amendment. Otherwise, there would have been no point in the Circuit Court of Appeals' action in reversing the judgment of the District Court, since the Circuit Court of Appeals in its first opinion had already held that the order was valid under the Federal Constitution (124 F. (2d) at p. 470.) This part of its opinion has not been withdrawn by the Circuit Court of Appeals. (130 F. (2d) at p. 19.) The opinion of the Circuit Court of Appeals must mean, therefore, that it is incumbent upon the federal court to determine the validity of the Railroad Commission's order under the state law by exercising an "independent judgment" upon the reasonableness of the order, disre-

garding any evidence that may have been heard by the Railroad Commission and any findings which it may have made upon such evidence, and determining for itself what constitutes "substantial evidence" to support the Commission's order.

It is submitted that this conclusion of the Circuit Court of Appeals is in direct conflict with the decisions by this Court in the *Rowan & Nichols cases*. In those cases, it was plainly stated that the Federal courts would go no further in testing the validity of an order of the Railroad Commission under the State's statutes than they would in testing its validity under the Federal Constitution. This Court's language in the first *Rowan & Nichols case* is as follows (310 U. S. at p. 584):

> "What ought not to be done by the federal courts when the Due Process Clause is invoked ought not to be attempted by these courts under the guise of enforcing a state statute. Whether the respondent may still have a remedy in the state courts is for the Texas courts to determine, and it is not foreclosed by the denial, on the grounds we have indicated, of the extraordinary relief of an injunction in the federal courts."

In the second *Rowan & Nichols case*, this Court, in passing on the constitutional issue, said (311 U. S. at p. ~~346~~ 575):

> "Nor, on the basis of intrinsic skills and equipment, are the federal courts qualified to set their *independent judgment* on such matters against

that of the chosen state authorities." (Our emphasis.)

This Court further held that the District Court erred in striking down the order on the ground that it did not prorate production on a "reasonable basis," saying (311 U. S. at p. 577):

> "In denying the petition for rehearing in the earlier cases we held that whatever rights the state statute may afford are to be pursued in the state courts, 311 U. S. 614."

In holding, as it has in this case, that the District Court must go beyond the inquiry which is necessary in order to test the validity of the Railroad Commission's order under the Due Process Clause and must follow the rule of the state courts and exercise its "independent judgment" on a trial de novo to determine the reasonableness of the order under the state statute, the Circuit Court of Appeals has held contrary to the decisions of this Court just referred to.

4.

Even if the duty rested upon the District Court to exercise its independent judgment in determining the reasonableness of the Railroad Commission's order under the state law, the District Court heard sufficient evidence to justify its holding that the order is valid under the state law.

To sustain their attack upon the validity of the Railroad Commission's order, the respondents offered and the District Court admitted in evidence the applications, protests, notices, and orders of the Railroad Commission pertaining to this particular permit (R. 136-161, 384), the general spacing orders of the Railroad Commission relating to the East Texas Field (R. 111-132), plats, deeds, and stipulations of the parties affecting title to the permit strip and the adjacent lands (R. 104-110, 212), copies of previous orders of the Railroad Commission granting permits to drill on the permit strip and court proceedings relating thereto (R. 164-208), the transcripts of the evidence heard by the Railroad Commission at the three hearings upon this permit (R. 233-384), the original testimony of the Railroad Commission examiner who conducted the hearings regarding the manner of taking the testimony and his report to the Railroad Commission (R. 213-230), and the original testimony of a petroleum engineer as to the drainage of oil to and from the permit strip and adjacent leases. (R. 366-383)

To sustain the order, the respondents offered the original testimony of two witnesses, A. O. Phillips, the drilling contractor who testified as to the facts regarding the four wells drilled under the permit (R. 340-342), and Gordon Griffin, a petroleum engineer, who testified as to the geological facts in connection with the East Texas field and this particular area. (R. 393-398)

The testimony of J. D. Copeland, the Railroad

Commission examiner (R. 213-230), related to the contention asserted by the respondents that the Railroad Commission did not give proper consideration to the evidence introduced at the hearings conducted by the examiner. (R. 14, 36.) The District Court found that a fair and proper consideration of the evidence was given by the Railroad Commission (R. 89-90). This ground for attack upon the order has been abandoned by the respondents, having never been raised at any time in the Circuit Court of Appeals or in the cross-petition for certiorari which was filed in No. 496, October Term, 1942, in this Court, entitled *Sun Oil Company, et al.* v. *G. E. Burford.*

The remaining grounds for attack upon the validity of the Railroad Commission's order under the state law were (1) that the 2.33 acre strip was a voluntary subdivision from a larger tract, made after the adoption of the Railroad Commission's spacing rule, and under the Texas decisions could not be considered by the Railroad Commission as a separate tract in granting a permit to drill a well as an exception to the spacing rule to prevent the confiscation of property (R. 20); (2) that a permit granted on October 11, 1934, to Burford's predecessor in title had been cancelled by a court order entered January 11, 1935, and that this court order made the validity of the present order *res judicata* (R. 12); (3) that at the time of the issuance of the Railroad Commission's permit order, a suit was then pending in the state courts attacking the validity of still another permit, which had been granted Febru-

ary 1, 1934, and that because of the pendency of such suit the Railroad Commission did not have jurisdiction to consider Burford's application (R. 13); and (4) that in any event, the Railroad Commission abused its discretion in granting a permit for four wells instead of a lesser number (R. 20-25).

The District Court found that "the issues of law and fact are with the defendants" (R. 87) and concluded that "the various matters of state law raised present no federal question and furthermore present no matter of such merit as to warrant the issuance of an injunction." (R. 91.) On the plea of *res judicata*, the court found that the conditions in the East Texas oil field and on the leases adjacent to the Burford lease had so changed since the entry of the court order in 1935 that the plea should be overruled. (R. 90)

The District Court's judgment is clearly sustainable under the state law:

(1) The Railroad Commission was entitled to consider the 2.33 acre strip as a separate tract. At the time of the subdivision of the 2.33 acre tract from the west 50 acres lease to Sun Oil Company, in February, 1931, the spacing rule in the East Texas oil field provided for spacing distances of 150 feet from property lines and 300 feet from other producing oil wells (R. 11). Converted to acreage, the rule contemplated the drilling of one well to about 2.07 acres. The strip is too narrow (49 feet x 2,131 feet) to allow the drilling of a well without a special per-

mit, but since the total area exceeds the area contemplated by the rule, the Railroad Commission may consider it as a separate tract. *Humble Oil & Refining Co.* v. *Railroad Commission*, 94 S. W. (2d) 1197 (Texas Civil Appeals, application for writ of error refused by Texas Supreme Court); *Wencker* v. *Railroad Commission*, 149 S. W. (2d) 1009 (Texas Civil Appeals, application for writ of error "dismissed, correct judgment," Texas Supreme Court).

(2) Where conditions have changed since the entry of a judgment cancelling a permit order, the Railroad Commission may grant a new permit and its findings that conditions have changed are presumptively valid. *Magnolia Petroleum Company* v. *New Process Production Company*, 129 Tex. 617, 104 S. W. (2d) 1106; *Stanolind Oil & Gas Co.* v. *Edgar*, 107 S. W. (2d) 631; *Stanolind Oil & Gas Co.* v. *Railroad Commission*, 107 S. W. (2d) 633; *Shell Petroleum Corporation* v. *Railroad Commission*, 86 S. W. (2d) 57 (Texas Civil Appeals, application for writ of error dismissed). The District Court's finding (R. 90) that conditions had so changed as to justify the Railroad Commission in granting the permit here under attack is sustained by evidence of the drilling of additional wells on adjacent tracts (R. 376, 395) so as to cause admitted drainage of Burford's lease (R. 243, 244) as well as notorious changes in pressure, water encroachment and heavy withdrawals of oil from the reservoir during the intervening years (R. 375).

(3) The pendency of a suit attacking another

permit, issued on February 1, 1934, to a predecessor in title of Burford, did not deprive the Railroad Commission of jurisdiction to consider and grant Burford's application. This early permit was granted without notice and hearing and was attacked on that ground by the Sun Oil Company in the suit in question (R. 195). Sun Oil Company immediately obtained an ex parte restraining order on May 30, 1934, against the drilling of any well under this permit (R. 204). This permit was thereupon abandoned by the permittee and no attempt was made to assert any rights under this permit. At the hearing before the Railroad Commission on Burford's application in 1938, it was stated without contradiction that the February, 1934, permit "has been abandoned long since" (R. 237, 292.) After the Burford permit was granted, the state court finally on November 29, 1939, entered a judgment setting aside the 1934 permit on the sole ground that the 1934 permit was entered "without notice and hearing as required by law," the judgment being without any adjudication on any other issue, and without prejudice to the rights of any of the parties "to apply to the Railroad Commission of Texas for other permits to drill oil and gas wells at such places on the tract of land above mentioned as they may desire." (R. 209, 210.)

Under the Texas law, since the 1934 permit was entered without notice or hearing, the Railroad Commission never acquired jurisdiction to grant the permit, and the court on appeal had no power to adjudicate the merits, but could only set aside the order for want of jurisdiction on the part of the Railroad

Commission to grant it. *Magnolia Petroleum Co.* v. *New Process Production Co.*, 129 Tex. 617, 104 S. W. (2d) 1106. In other words, the merits of the right to drill a well on this strip was not a matter pending before the court, and therefore the Railroad Commission's jurisdiction, upon proper notice and hearing, to pass upon a new application, was not ousted. Furthermore, the February, 1934 permit had been abandoned, and such abandonment gave the lease-owner the right to apply for a new permit, *McNeny* v. *Railroad Commission*, 96 S. W. (2d) 96, especially where conditions are shown to have changed. *Magnolia Petroleum Co.* v. *New Process Production Co., supra; Railroad Commission* v. *Wencker*, 161 S. W. (2d) 800 (Texas Civil Appeals).

(4) The Railroad Commission did not abuse its discretion in granting a permit to drill four wells instead of only one. This, of course, is a matter peculiarly within the discretion of the Railroad Commission. The evidence sustains the Railroad Commission's action. This strip was segregated from the Sun Oil Company lease in 1931 (R. 4), but no wells were permitted to be drilled upon the strip until 1939 (R. 39). In the meantime, beginning in 1932 (R. 263), Sun Oil Company had drilled seven wells on its lease, and Magnolia Petroleum Company had drilled six wells on its lease (R. 399), which had produced 100% of the recoverable oil originally under their leases (R. 286), all of which had been replaced by oil drained from other leases (R. 286, 347). It was conceded that both the Sun and the Magnolia wells were draining Burford's lease (R. 243-245).

The geologic conditions in this area, which is on the eastern edge of the East Texas field, are extremely erratic (R. 397), making it highly uncertain whether a location will be a producer or not. In fact, of the four wells drilled under the present permit, one has turned out to be a dry hole and another has turned out to be a pumper (R. 391). Under the Texas decisions, the relative density of drilling is not necessarily conclusive; the Railroad Commission may properly consider the length of time adjacent leases have been producing and the amount of oil already produced by them. *Humble Oil & Refining Co.* v. *Potter*, 143 S. W. (2d) 135 (Texas Civil Appeals).

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the United States Circuit Court of Appeals should be reversed.

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